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No. 90-735

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL S. BLUESTEIN, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits the Federal Aviation Administration from requiring airlines to administer random drug tests to flight crews, maintenance personnel, and certain other employees holding safety-related positions in the airline industry.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 908 F.2d 451.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1990. On September 24, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 7, 1990. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitions for review brought by unions and individual employees in the commercial aviation industry challenging regulations issued by the Federal Aviation Administration in 1988. Those regulations required certificated air carriers to administer drug tests to the following categories of employees: (1) flight crew members; (2) flight attendants; (3) flight instructors or ground instructors; (4) flight testing personnel; (5) aircraft dispatchers; (6) maintenance personnel; (7) aviation security or screening personnel; and (8) air traffic controllers. Pet. App. 147a. In promulgating the regulations, the FAA explained that "[i]n order to ensure that aviation safety is not compromised by a failure to detect drug users in the aviation industry, * * * it is appropriate and necessary to establish a comprehensive anti-drug program at this time." Pet. App. 21a. The FAA acted in response to "concrete evidence of drug use in the commercial aviation sector." *Id.* at 40a.[1]

The regulations provide for random testing. Pet. App. 149a. To eliminate supervisory discretion in choosing employees to be tested, selection of employees to be tested must be made "using a random number table or a computer-based, number generator that is matched with an employee's social security number, payroll identification number, or any other alternative method approved by the FAA," 53 Fed. Reg. 47,024,

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[1] The FAA cited reports by the National Transportation Safety Board concerning airline accidents attributable to flight crews' narcotics use, see Pet. App. 38a-39a, press reports in the Pittsburgh area—later confirmed by the FBI—regarding airline employees' narcotics use, see *id.* at 39a, and data from previous drug testing performed by companies within the industry, see *id.* at 40a.

47,058 (1988). After the first year of testing, the employer must conduct random tests at "an annualized rate equal to not less than 50 percent of [the] employees performing [the] function[s] listed." Pet. App. 149a.

Testing must be done under procedures that track the HHS drug testing procedures for government employees; those procedures were before this Court in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 661-663, 672 n.2 (1989). See Pet. App. 145a. Accordingly, the collected samples must be analyzed by an HHS certified laboratory. See *ibid.* The employers must provide for confirmation testing and must permit an employee—if there is a confirmed positive—to demand a retest of the original specimen at the same laboratory or another HHS certified laboratory. See *id.* at 151a-152a. Furthermore, the employers must provide for review by a qualified physician of any confirmed positive; that physician must then determine whether there is "an alternative medical explanation." *Id.* at 152a. In that regard, the physician must give the employee an opportunity to discuss the test result and submit any medical records regarding legally prescribed medication. See *id.* at 152a-156a. In addition, the employers may not release drug testing results to third parties without "the specific, written consent of the employee." *Id.* at 152a.

2. The court of appeals upheld the FAA regulations. Pet. App. 1a-15a. It first concluded that under *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), when a search "serves special governmental needs, beyond the normal need for law enforcement, it is necessary to

balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Pet. App. 8a-9a (quoting *Von Raab*, 489 U.S. at 665-666).

The court of appeals next determined that the balance of governmental and individual interests justified random drug testing of the specified airline employees. The court pointed to the

> FAA administrative record [that] included evidence that a number of pilots and other airline crew members had received treatment for cocaine overdoses or addiction; that tests by companies in the industry had turned up instances of drug abuse by pilots and mechanics; and that drugs were present in the bodies of pilots in two airplane crashes.

Pet. App. 11a-12a. The court recognized that while the random and unannounced nature of the FAA's testing program adds "some weight to the 'invasion of privacy' side of the Fourth Amendment balance," it is "insufficient to tip the scales against the FAA drug testing program at issue here." *Id.* at 12a.[2]

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[2] The court of appeals also rejected petitioners' challenge to the FAA's regulations under the Administrative Procedure Act. See Pet. App. 14a. Petitioners have not sought further review of that aspect of the court of appeals' judgment.

ARGUMENT

1. Petitioners principally contend (Pet. 11) that the FAA's program of random testing is "vastly more intrusive" than the programs at issue in *Skinner* and *Von Raab*, and thus cannot be sustained on the basis of the balancing analysis set forth in those decisions. Eight circuits, however, have now upheld programs providing for random drug testing against similar Fourth Amendment claims. *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir. 1989) (Boston police officers required to carry firearms), cert. denied, 110 S. Ct. 404 (1989); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit employees);[3] *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare material); *Penny* v. *Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (en banc) (Chattanooga police officers and fire fighters);[4] *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers in regular contact with prisoners); *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *International Bhd. of Elec. Workers, Local 1245* v. *Skinner*, 913 F.2d 1454 (9th Cir. 1990)

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[3] Contrary to petitioners' suggestion (Pet. 19 n.11), the Third Circuit decided *Transport Workers* after *Skinner* and *Von Raab*, following a remand from this Court to reconsider a prior decision in the case in light of *Skinner* and *Von Raab*.

[4] In *Penny*, the court of appeals rejected contentions that the random testing program was invalid under the Fourth Amendment because it did not require reasonable suspicion as a basis for testing. The court, however, remanded the case for consideration of other constitutional challenges to the program.

(gas pipeline workers); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice lawyers with top secret security clearances), cert. denied, 110 S. Ct. 865 (1990); *National Fed'n of Federal Employees* v. *Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (various safety and security-sensitive civilian employees of the Army, as well as Army drug counsellors), cert. denied, 110 S. Ct. 864 (1990); *American Fed'n of Government Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation employees with safety-sensitive jobs, including aircraft mechanics and safety inspectors); *Hartness* v. *Bush*, 919 F.2d 170 (D.C. Cir. 1990) (employees of the Executive Office of the President with secret clearances).

Except for *Rushton*, which was cited with approval in *Skinner*, 489 U.S. at 628, all of these decisions were issued after this Court's decisions in *Von Raab* and *Skinner*. Notwithstanding the fact that the programs at issue provided for *random* testing, the courts uniformly applied the balancing approach outlined by this Court in those decisions, which requires a court to weigh "the public interest in the * * * testing program against the privacy concerns implicated by the tests * * * to assess whether the tests required * * * are reasonable." *Von Raab*, 489 U.S. at 679. Thus, while some of the decisions—including that of the court below, see Pet. App. 12a—have acknowledged that random testing is a factor to be weighed in the constitutional analysis, the courts of appeals have rejected the contention that random testing calls for fundamentally different constitutional treatment. The statement of the District of Columbia Circuit in *Harmon* v. *Thornburgh*, 878 F.2d at 489, is representative:

> Certainly the random nature of the [agency] testing plan is a *relevant* consideration; and, in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.

This approach is consistent with the reasoning of this Court's decisions. Contrary to petitioners' contention (Pet. 10), the Court's observation in *Skinner*, 489 U.S. at 624, that a search may be reasonable without individualized suspicion "where the privacy interests implicated by the search are minimal," does not foreclose random testing. Random testing involves no greater physical restraint on the individuals tested than the program in *Skinner*. To the extent that the magnitude of the intrusion relates to the expectations engendered by the characteristics of an employee's job, see *id.* at 625, nothing in this Court's decisions suggests that an employee has a fundamentally greater expectation of avoiding random testing than the type of testing at issue in this Court's cases.[5] Accordingly, further review of this case is not warranted.

2. Petitioners seek to avoid the straightforward application of *Von Raab* and *Skinner* by citing various objections to the FAA's random drug testing program. Those objections are insubstantial.

First, petitioners assert that, whereas the post-accident and pre-employment testing involved in *Von Raab* and *Skinner* "will be a rare (and possibly even

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[5] For these reasons, petitioners' criticism (Pet. 15-19) of the circuits' uniform application of *Skinner* and *Von Raab* to random drug testing programs is wide of the mark.

a one-time) event in an employee's worklife," Pet. 13, random testing is repetitive and amounts to a continuous threat to an employee's privacy. Petitioners' objection is overstated. Under the FAA regulations, the airlines annually will administer a number of tests equalling 50% of the covered employees. In other words, each employee will be tested on the average of once every two years. See Pet. App. 149a. This frequency is less than that of the medical examinations which many airline employees are required to take. See 14 C.F.R. 67.11, 67.13. Indeed, under federal regulations, airline pilots must take medical examinations every six months. See 14 C.F.R. 61.23 (a)(1).

Second, petitioners point to the fact that random testing is not triggered by any individualized event, such as an accident or an application for a different job. Pet. 13. However, the same objection might be lodged against the medical examinations that commercial pilots must take—a requirement that is certainly valid. Where a medical requirement—including freedom from drug use—is a valid requirement for a safety-sensitive job, then the job itself is a sufficient trigger for a reasonable test designed to verify compliance.

Third, petitioners object to the fact that the tests are "*entirely unannounced.*" Pet. 13 (emphasis in original). As the court of appeals noted, however, the FAA reached the "reasonable conclusion that random testing without advance notice will prove to be a greater deterrent than testing with advance notice." Pet. App. 13a; see *American Fed'n of Government Employees* v. *Skinner*, 885 F.2d at 891 ("While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection

process and presumably enhances drug-use deterrence." (footnote omitted)). In any event, employees and their representatives will have advance notice that the testing program itself is an FAA requirement, thus providing "visible evidence, reassuring to law-abiding" employees, that the random tests are "duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

3. Finally, petitioners suggest (Pet. 7-8, 15-19) that the court below—like other circuits—has misapplied the analysis set forth in *Skinner* and *Von Raab*. In *Skinner* and *Von Raab*, this Court made clear that the principal factor in assessing employee drug testing—whether random or not—is an analysis of the particular characteristics of the positions subject to testing in order to determine and balance the extent of the government's interest in testing and the employee's reasonable expectation of privacy. In the decisions following *Skinner* and *Von Raab*, the courts of appeals have been performing this analysis with care. They have accepted government claims that particular categories of employees could be subjected to random testing, see pp. 5-6, *supra*, while rejecting similar claims for other categories, see, *e.g.*, *Taylor* v. *O'Grady*, *supra* (prison employees not in regular contact with inmates); *National Fed'n of Federal Employees* v. *Cheney*, *supra* (employees of Army drug testing laboratories); *Harmon* v. *Thornburgh*, *supra* (Department of Justice lawyers without top secret national security clearances or not involved in drug prosecutions).

Here, there can be no serious dispute as to the extreme safety sensitivity of the jobs for which the FAA has required testing. Commercial aviation employees work in an environment of pervasive federal

regulation, specifically designed to ensure that they are fit and qualified to perform their jobs.[6] Those employees have accepted jobs which involve responsibility for the lives of the travelling public. In this context, they "may expect intrusive inquiries into their physical fitness for those special positions." *Von Raab*, 489 U.S. at 671. Accordingly, the government's substantial interest in ensuring a drug-free airline workforce outweighs the limited intrusion into the privacy interests enjoyed by persons holding safety-sensitive positions in the industry.

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[6] Commercial pilots must obtain medical certificates, for which they must take examinations covering vision, hearing, equilibrium, cardiovascular fitness, and general medical fitness. 14 C.F.R. 67.13, 67.15. For airline pilots, the examination must be taken every six months. 14 C.F.R. 61.23 (a) (1). In addition, pilots must also pass various tests to demonstrate flying proficiency and aeronautical knowledge. 14 C.F.R. 61.125, 61.127, 61.129, 61.153, 61.155, 61.157. Annual proficiency checks are also required. 14 C.F.R. 61.55, 61.57, 61.58.

There are also comprehensive regulations governing the FAA's certification of flight crew members, 14 C.F.R. 63.1 *et seq.*, as well as control tower operators, aircraft dispatchers, mechanics, repairmen, and parachute riggers, 14 C.F.R. 65.1 *et seq.* Flight attendants must also be trained, and the contents of the training course are federally prescribed. 14 C.F.R. 121.421, 135.349.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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